C.C.E., Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW. Case 8–CA–26025

August 31, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On August 18, 1994, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as explained below and to adopt the recommended Order as modified.[2]

In agreeing with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act, we rely on the Board's decision in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), which established a balancing test for determining whether an employer's denial of access to its facility for the union representing its employees violates Section 8(a)(5) and (1). In *Holyoke*, supra at 1370, the Board said,

> [E]ach of two conflicting rights must be accommodated. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2d Cir. 1966). First there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with. As noted by the Supreme Court in *Babcock & Wilcox*, supra, 351 U.S. at 112, the Government protects employee rights as well as property rights, and ''[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.''
>
> Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternative means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

The Respondent argues in its exceptions that its concerns about the disclosure of confidential, proprietary, and trade secret information are a paramount consideration. Further, the Respondent suggests that access as requested by the Union would cause unwarranted disruption of its operations.[3]

We find, however, as the judge did, that the Respondent has provided access to its facility to many individuals and groups, notably school children, a video production crew, cub scouts, vocational school students, potential customers, dealers and their drivers, and suppliers. All of these visitors have been given access to the facility subject to advance notice, accompaniment by a company representative, and such safety measures as the Respondent deems necessary. Additionally, the Respondent has taken steps to ensure that its proprietary interests are protected, such as covering distinctive features of vehicles so visitors could not disclose information about designs and materials to its competitors. When the Union requested access, the Respondent did not offer access conditioned on safety, proprietary, or any other concerns; rather, as the judge stated, the Respondent denied any and all access ''even under conditions that would address [its] concerns . . . pertaining to its asserted property rights.''

Turning to the employees' right to effective representation, the Respondent contends in its exceptions that access is not necessary because meaningful bargaining has taken place without providing the Union access. The Respondent points to the fact that the par-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to provide the standard notice-posting language.

[3] The Respondent asserts that the Union requested unrestricted access because the requests were not limited in terms of time or scope. We disagree.

In October 1993, during a bargaining session, the Union's international representative, Bob Brummitt, orally requested access to the plant to collect information related to collective bargaining; the Respondent refused. By letter dated November 23, 1993, Brummitt again requested access ''for informational purposes so I can properly discharge my obligation as bargaining agent.'' The Respondent denied this request as well.

We find that the Union's requests, clearly indicating that access was sought for collective-bargaining purposes, were sufficiently specific to fall within the limited right of union access recognized in *Holyoke*, supra.

ties have reached agreement on all contractual issues except one and argues that this proves that the Union can properly represent the unit members without access. We reject the Respondent's argument.

It is well settled that the information the Union seeks to obtain from direct observation of the plant premises and processes is presumptively relevant to and necessary for its role as the employees' collective-bargaining representative. In upholding a union's need for access to gather information about the relative position of a particular job within the overall ''hierarchy of job classifications,'' the Board has held that ''there is no adequate substitute for actual on-the-job observation of the work performed for the purpose of ascertaining what skills are actually utilized.'' *Exxon Chemical Co.*, 307 NLRB 1254, 1255 (1992). Likewise, in this case, there can be no adequate substitute for the Union representative's direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate matters such as job classifications, safety concerns, work rules, relative skills, and other matters necessary to develop an informed and reasonable negotiating strategy. This is particularly true in the circumstances of this case where the parties were bargaining for an initial contract.

In *Holyoke*, supra, the parties had a longstanding bargaining relationship and the Union's request for access to the fan room was related to only one portion of its representational responsibilities. In this case, by contrast, the Union and the Respondent have been engaged in negotiations for an initial contract and the relationship is still in the fledgling stage. It is readily apparent that the Respondent's denial of access to the Union's international representative prevents the experienced official from gaining a complete understanding of the Respondent's operation and thus prevents the employees from getting the representation they voted for in the certification election. Furthermore, without a collective-bargaining agreement, the Union has no other avenue, such as a grievance procedure or arbitration, for obtaining the desired information. The denial of access at this crucial phase of the parties' bargaining relationship can serve only to undermine the Union's status as bargaining representative.

In sum, we find that the Respondent's interest in keeping union representatives off its property is weak. By contrast, the Union's interest in obtaining information for collective-bargaining purposes is substantial. Therefore, we agree with the judge that, on balance, the Respondent's property rights are outweighed and that the Respondent must afford the Union reasonable access to its facility to observe, inspect, and investigate plant conditions, equipment, employee operations, and working conditions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, C.C.E., Inc., Norwalk, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

''(b) Post at its facility in Norwalk, Ohio, copies of the attached notice marked 'Appendix.'[3] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.''

MEMBER BROWNING, concurring.

I concur in the Board's decision finding a violation of Section 8(a)(5) and (1) under the Board's current standard for determining whether an employer unlawfully denies the union representing its employees access to its premises, *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985). In the absence of sufficient votes on the Board to overrule *Holyoke*, I will continue to apply that standard as existing precedent.

In my view, however, the *Holyoke* standard is unduly restrictive of a union's right of access in circumstances where it already represents the employer's employees. I believe that, as the employees' exclusive representative for collective-bargaining purposes, the union stands in the shoes of the employees because it is their agent for the purposes of bargaining. Therefore, the union's right to enter the employer's premises can be limited only to the same extent that an employer may limit its employees' right to engage in Section 7 activity on its premises. In that regard, the Supreme Court held in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), that an employer cannot lawfully implement rules restricting employees' union activities on company premises during their breaktimes or before and after work unless it demonstrates that special circumstances exist making such a rule necessary in order to maintain production or discipline. Similarly, in my view, an employer cannot restrict the access of the union, its employees' agent for purposes of bargaining, unless it can show that restriction or denial of access is necessary to maintain production or discipline. In this case, the Respondent has not shown that its absolute denial of access to the Union's representatives is necessary to maintain production or discipline. Indeed, the evidence here is clear that no special circumstances

exist, because the Respondent is able to maintain production and discipline even when nonemployee visitors enter the plant.

Accordingly, for these additional reasons, I would find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to grant the Union access to the plant to obtain information for collective-bargaining purposes.

Mark F. Neubecker, Esq., for the General Counsel.
Davis E. Bishop and *Paul Mancino, Esqs*., of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Bellevue, Ohio, on June 27, 1994. Briefs subsequently were filed by both parties. The proceeding is based on a charge filed December 22, 1993,[1] by International Union, United Automobile, Aerospace & Agriculture Implement Workers of America, UAW. The Regional Director's complaint dated February 4, 1994, alleges that Respondent C.C.E., Inc., of Norwalk, Ohio, violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing to allow the Charging Party access to its facility.

On review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the manufacture of hearses and limousines at its facility in Norwalk and annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Ohio. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

As noted, the Respondent is engaged in the manufacture of funeral coaches (hearses) and stretch limousines. It has been designated a ''Qualified Vehicle Modifier'' by Ford Motor Company and has also been designated ''Master Coach Builder'' by the Cadillac Division of General Motors. It manufactures four product lines: funeral coaches and limousines under the ''Miller-Meteor'' brand names. The Company's major competitor is S&S, a nonunion facility located in nearby Lima, Ohio.

The Charging Party was certified on July 27 to represent a unit of production and maintenance employees at Respondent's Norwalk facility. Subsequently, during October the Union's international representative, Bobby Brummitt, orally requested permission to enter Respondent's facility for the purpose of collecting information vital to the process of collective bargaining. Respondent's agent, Attorney David Bishop, denied Brummitt access to Respondent's plant. By letter dated November 23, Brummitt again requested access to its plant. After Bishop's letter of December 1, 1993, was received, Brummitt filed the instant charge.

The record shows that approximately 80 employees work at Respondent's facility and use all manner of tools, including saws, acetylene torches, welders, grimders, drills, screw guns, spray guns, and pneumatic tools, and they are divided into several different departments, they also utilize chemicals, caulks, glues, thinners, paint, and cleaning supplies.

Brummitt testified that he sought access to the facility in order to better serve the members of his union and specifically to observe the various skill levels required to perform bargaining unit work, as well as to inspect possible health or safety problem areas. (Brummitt testified that he had attempted to obtain information from members of the Union's bargaining committee but with perfect results.)

The parties have met nine times for the purpose of negotiating a first time contract. (Tr. 19.) To date the parties have settled most language issues but have not made any progress on economic items. Brummitt's concern for the health and safety of unit employees is based on the various substances and tools mentioned above and his desire for a first hand inspection of the premises if the bargaining agent is expected to intelligently address any health and safety issues. Also, because Respondent's facility is highly departmentalized and employees with different skills are employed in each department, Brummitt indicates he will be better able to evaluate Respondent's economic offer after he has familiarized himself with Respondent's operations.

Scott Plew, a member of the bargaining committee, has been employed by the Respondent for 2 years and 7 months. He currently works in metal fab but he has also worked in the prep shop, the body shop, the refurb department, the hoist area, in the assembly department, and in the quality control department. (Tr. 35.) Plew testified that during his time with Respondent that various nonemployees have toured the facility. (Tr. 36.) These visitors included customers as well as cub scouts and the mayor and city council.

Respondent's executive vice president, Timothy Hall, testified that he participated in decisions to allow visitors to the plant and that they attempted to protect their product line at certain times. He stated that in general, the differences between their vehicle or the interior and exterior finishes and shapes of those vehicles and that when they have new cars or cars that are generally not available on the market, they will hide them from certain people when they tour the facility; and have taken steps such as putting covers over the car or putting them in the separated prep shop and then denying access to that part of the facility when we give the tours. He also said they have bagged the back end of a car to give shape differences or so that the people don't see what exactly the car should look like and that information about its materials would hurt them if it got to their competition.

He agreed that school children had been shown tapes of the production of their vehicles and given brief tours (under supervision and with safety glasses), and that a video crew had been in the plant to prepare at least two marketing tapes which show an initial vehicle, different steps in the manufacture of their product, and the finished limo or hearse. He also noted that some cub scouts, students from a vocational

[1] All following dates will be in 1993 unless otherwise indicated.

school, and Japanese visitors who were potential customers, as well as dealers or drivers who pick up vehicles for dealers, come in and inspect cars and may be given tours. It also gives essentially unrestricted tours to representatives from Cadillac, Lincoln, and Buick who provide their initial chassis.

He also testified that Brummitt never objected to the possibility of vehicle features being covered as it was never offered as an option by the Company and was never discussed. The Company also never disclosed to the Union the existence of the production and product tape prior to the disclosure at the hearing. During contract negotiations on the subject of ''Arbitration'' the Respondent proposed the following visitation language:

> The International Representative of the Union shall be permitted to visit the plant during working hours, providing he has received permission in advance, and such permission shall not unreasonably be withheld, for the purpose of investigating grievances at the third step of the grievance procedure without any disruption of Company operations. During any plant visit, the International Representative will be accompanied by a Company Representative.

No proposal was made, however, that would offer the union representative any access, under any conditions or restrictions, during negotiations.

III. DISCUSSION

The Board has taken two approaches to access cases of this nature, see *Winonea Industries*, 257 NLRB 695 (1981), and *Holyoke Water Power Co*., 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), as discussed in *Hercules Inc*., 281 NLRB 961 (1986).

The *Holyoke Power* decision recognizes that a union representative does not have an absolute right to enter an employer's premises to obtain information pertaining to its duties as bargaining representative of unit employees but has a qualified right that is to be balanced against the employer's right to control its property.

The Board, in *Holyoke*, at 1370, said that when responsible representation by the union requires that it have access to the employer's property, i.e., there is no alternative means to achieve that end, it would follow the balancing test applied by the Supreme Court in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), to accommodate the rights of both parties ''with as little destruction of one as is consistent with the maintenance of the other'' and the Court observed, the door should not be either ''always open or always closed.''

In *Hercules*, the Board said:

> Thus, it is settled that relevance of, and need for, the information does not translate into an absolute or unquestioned right to access. On the other hand, it is equally clear that, circumstances permitting, the Union does have statutory right to invade Respondent's property rights in order to obtain live and direct information of the kind involved in this case and ''that property rights alone will not suffice as a reason for denial of rights guaranteed under the Act.'' *Fafnir Bearing Co*., 146 NLRB 1582, 1586 (1964), a case on which the Board rested its *Holyoke* decision.

Here, the Union and the General Counsel clearly have shown that the information sought by personal observation of a qualified union representative is relevant and necessary for the Union to properly function in its role as the bargaining representative of the unit employees.

Information pertaining to working conditions is presumptively appropriate for bargaining, *Press Democrat Publishing Co. v. NLRB*, 629 F.2d 1320 (1979), and where the information sought covers the terms and conditions of employment within the bargaining unit it involves the core of the employer-employee relationship and the standard of relevance is very broad, and no specific showing is normally required; see *Ohio Power Co*., 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (1976), moreover, a union need not demonstrate actual instances of grievances or contractual violations as a prerequisite to requiring information. *Doubarn Sheet Metal*, 243 NLRB 821 (1979).

It otherwise is clear that for the Union to be afforded its right to negotiate on a level playing field, the employees must not be limited to representing and obtaining information themselves but must be allowed the services of expert or experienced representatives. Accordingly, their representative is entitled to access for the purposes of his own expert or experienced observation, inspection, or investigation of plant equipment and conditions and employee operations and working conditions, see the *Hercules* case, supra.

Here, the Respondent did not partially restrict access, but denied any access at all, even under conditions that would address the concerns that it argues on brief pertaining to its asserted property rights. The only apparent concession it was willing to advance occurred during contract negotiations when it proposed a visitation provision (with advanced notices, permission, and accompaniment by a company representative) for investigation of grievances at the third step.

Just as an employer who asserts that information is confidential must establish a legitimate and substantial confidentiality interest sufficient to outweigh a union's right to relevant information, see *Resorts International Hotel Casino v. NLRB*, 996 F.2d 1553 (3d Cir. 1993), an employer must present a good-faith objection to an information or access request and offers to cooperate in reaching a mutually acceptable accommodation. Then, it is incumbent on the union to try to reach some type of agreement on the form, extent, or timing of the visit, compare *Soule Glass Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981).

Here, the Respondent failed to communicate any legitimate or substantial reasons for its denial of access and it has proposed no alternatives. Otherwise, it is shown that the Company has made a common practice of allowing plant visits by numerous and various groups (during working times) essentially subject only to advance notice, safety consideration, accompaniment by a company representative, and the occasional concealment of new features on its vehicles.

Accordingly, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act by asserting unlimited property rights as it pertained to access by a union representative during collective bargaining for a first contract, when at the same time it was granting that right to components of the general public.

Here, the Union was not obligated to rely only on second hand information and descriptions of working condition and a union has the right to have an experienced representative observe and obtain information if it so chooses, especially during collective bargaining for a first contract. Here, the Company has failed to show any serious potential for disruption of its rights or interest and the right of the Union to obtain information for purposes of collective bargaining must prevail, see the *Holyoke* and *Hercules* cases, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material here the Union has been the exclusive bargaining representative of the Respondent's production and maintenance employees at its Norwalk, Ohio facility.
4. Respondent has refused to bargain collectively with the Union as the representative of the employees in the certified unit by refusing to grant requests for access to its facility in order to allow the Union's representatives to directly investigate, inspect, and observe plant equipment and conditions and employee operations and working conditions relevant to the representatives duty to fulfill the Union's bargaining obligation and has thereby violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Because Respondent's denial of access was predicated on even a colorable claim of business necessity, it shall be required to grant requests for access to chosen representatives without limitation or condition, except as follows. Respondent has demonstrated a proprietary interest in securing its secret production, however, it appears that the need for such security does not extend to the entire plant or at all times. Accordingly, the Respondent may protect its interest as it has with other visitors by covering such ''secret'' portions of its product or production.

Otherwise, the Unions's representative shall have full access in keeping with the Board's accommodation policy set forth in *Holyoke Water Power Co*., 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), i.e., limited to reasonable periods and at reasonable times, consistent with the times least likely to disrupt Respondent's operations, to allow the Union's representatives to fully investigate not only potential grievances but also to investigate, inspect, and observe plant conditions, employee operations, and working conditions relevant to the Union's representatives duty to fulfill its bargaining obligations. Otherwise, it is not considered to be necessary that a broad order be issued; however, because the Respondent has engaged in illegal practices that affected the Union's access to information relative to ongoing negotiation of an initial contract, I recommend that the certification year be extended by 12 months as provided in *Thill Inc*., 298 NLRB 669 (1990).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, C.C.E., Inc., Norwalk, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, by refusing to grant the union request for access by the Union's representatives to its Norwalk, Ohio facility for reasonable periods and at reasonable working or production times sufficient to allow the Union's representatives to fully investigate, inspect, and observe plant equipment and conditions and employee operations and working conditions.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union grant access to its Norwalk, Ohio facility for reasonable periods and at reasonable working or production times to allow union representatives to fully investigate, inspect, and observe plant equipment and conditions and employee operations and working conditions relevant to the representatives duty to fulfill the Union's bargaining obligation.

(b) Post at its Norwalk, Ohio facility copies of the notice marked ''Appendix''[3] on forms provided by the Regional Director of Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification year shall be extended for 12 months after the date the Union is allowed access in conformance with this decision.

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, by refusing to grant the Union's request for access by the Union's representatives to our Norwalk, Ohio facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request of the Union, grant access to our Norwalk, Ohio facility for reasonable periods and at reasonable working or production times to allow union representatives to fully investigate, inspect, and observe plant equipment and conditions and employee operations and working conditions relevant to the representatives' duty to fulfill the Union's bargaining and representative obligation.

C.C.E., INC.